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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CARL RAY JACKSON,

Defendant and Appellant.

D053799

(Super. Ct. No. SCE265902)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Louis R. Hanoian, and Allan J. Preckel, Judges. Affirmed.

Carl Jackson appeals from a judgment convicting him of premeditated attempted murder based on his shooting of his former girlfriend. He argues the trial court erred by excluding impeachment evidence concerning the victim's methamphetamine use and alleged fraudulent misconduct. We find no reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Jackson and Karen Vidrio began dating in 2000 and were in a relationship for about 18 months. Both during and after their relationship there were several incidents of domestic violence. In November 2001, Jackson chased Vidrio and smashed her head into a brick wall after a disagreement at a restaurant where they had been drinking. Their relationship ended in April 2002, and Vidrio thereafter refused Jackson's repeated efforts to have contact with her. On the evening of May 4, 2002, Jackson left Vidrio a phone message, and based on this message Vidrio reported to the police that he was going to kill her. At about 11:15 p.m. that same night he jumped over her fence, pounded on her patio door, and broke through her front window. While he was doing this, Vidrio was on the phone with the police. When he entered her residence, he held a knife to her throat and said, "'It's over. I'm going to kill you. I told you we were going to be together forever.'" The police arrived and arrested him. On May 30, 2002, after Jackson was released on bail, he entered Vidrio's home at night when she was not there and "destroyed [her] home" while he was waiting for her. While at her home he stabbed himself about 31 times, and he was taken away by ambulance. He was arrested, pleaded guilty to the offenses charged for the May incidents, and served about four years in prison. He was released in April 2006.

The shooting involved in the case before us occurred at about 7:00 p.m. on October 29, 2006, at a bar (Shooters) frequented by Vidrio. Vidrio testified that when she arrived at the bar that evening, she asked bartender Susan Kaelin if she could use the phone. When Kaelin handed her the phone, Vidrio looked across the bar and saw

Jackson talking to his friend, Nels Torguson, who also worked as a bartender at Shooters. Vidrio went into the nearest bathroom because she knew Jackson "was there for [her]." She stayed in the bathroom for a minute or two, but then decided to leave because she did not want to "be caught" in there. Vidrio had a knife with her. Before leaving the bathroom, she opened the knife, put it back in its sheath with the blade pointing down, and put it in the front of her pants. When she walked out of the bathroom, she had her hand on the knife under her sweatshirt. She had decided not to try to run away from Jackson since she had done that before and had been caught by Jackson. She knew she was "going to have to fight for [her] life, because [she] knew the day was coming"

As Vidrio left the bathroom, she saw Jackson walking towards her. She continued walking towards him. She threw her purse down, intending to "try to survive." However, within seconds, she saw him pull a gun out of his pocket, and she turned to "get out of there." She never took the knife out of the sheath. Jackson grabbed her, put the gun in her back, called her a bitch, and shot her in her back. She fell against a pool table, and then was able to run out the back door of the bar.

Several eyewitnesses described their observations of the shooting. Torguson saw Vidrio get a phone from a bartender and go into the bathroom. About two minutes later, he saw Jackson arrive at the bar. Torguson asked Jackson if he and Vidrio were "okay together." Jackson stated that he and Vidrio were "fine." Torguson stated that was good because she was in the restroom. Jackson responded, "Then I guess I better leave." Jackson started walking in the same direction he had entered, which was towards the rear

entrance and the restroom. The next thing Torguson knew, Jackson raised his arm and fired his gun. Vidrio was standing with her back towards Jackson when she was shot.

Kaelin testified that Vidrio asked her if she could use the phone at the bar "because her ex-boyfriend was going to kill her." After Kaelin handed Vidrio the phone, Vidrio went into the bathroom. About 30 seconds later, Kaelin saw Jackson. Jackson talked to Torguson, and then walked around by a pool table near the bathroom and looked around the bar. When Vidrio exited the bathroom, she put the phone down on the bar counter. Kaelin told her, "'He's right behind me.'" Vidrio continued walking past Kaelin, and Jackson walked up to Vidrio. When they were about three feet apart, Vidrio turned around. Kaelin saw Vidrio's head go back "like he had pulled her hair." Kaelin then heard a shot and saw Vidrio's shoulders go back. At this time Vidrio's back was towards Jackson.

Bar patron Michael Grimaldi testified that he saw Vidrio enter the bar from the rear entrance, walk straight to the bar counter, and talk to Kaelin. Vidrio then entered the restroom with a telephone. Several minutes later, Grimaldi saw Jackson enter the bar and scan the room. Jackson then exited the bar by the rear entrance and paced by the back door as if waiting for someone. Vidrio exited the bathroom, gave the phone to Kaelin, and walked towards the area of the bar counter where she had left her things. Jackson re-entered the bar and walked towards Vidrio. Grimaldi saw Jackson walk up to Vidrio, and then saw that Jackson had a gun in his hand. Grimaldi stated "there's a gun," and started going towards Jackson. Jackson and Vidrio were about one foot apart, and Vidrio's back was towards Jackson when he had the gun up. By the time Grimaldi reached Jackson the

shot had already been fired. Grimaldi and another man grabbed Jackson and the gun and wrestled him to the floor. Jackson was restrained by people at the bar and held until the police arrived.

Torguson, Kaelin, and Grimaldi never saw Vidrio holding a knife.

The emergency room surgeon (Dr. Jack Yang) who treated Vidrio testified that Vidrio suffered a gunshot wound to the back. The bullet tore through her lung, broke through a rib, and ended up in her chest. She was having difficulty breathing and was bleeding internally. Her injuries were life-threatening because without medical attention she could easily have bled to death and stopped breathing. She was treated surgically and remained in the hospital for about two weeks. The bullet was not removed because removal could have caused more damage.

Defense

Jackson, testifying on his own behalf, stated that after he was released from prison in April 2006, he was rebuilding his life and had a new girlfriend. Vidrio was spreading negative rumors about him which were causing problems with his new girlfriend and upsetting him. Jackson decided to contact Vidrio at Shooters and tell her to leave him alone.

Before going to Shooters, Jackson went to his mother's home to get a gun that he had stored there. He put the gun in his pants pocket and brought it with him because he knew Shooters was "[Vidrio's] bar," and the people there were her friends. Also, the bar was a "tweaker bar" frequented by methamphetamine users, and methamphetamine users have a tendency to be "very unpredictable, aggressive, [and] paranoid." He was

concerned that people at the bar "would jump [him]," and he thought he might need to pull out the gun so he could "get out of there." He did not go to the bar with the intention of killing Vidrio or of assaulting her with the gun.

Jackson testified that when he arrived at the bar, he was relieved he did not see Vidrio there because being at the bar reminded him how unstable and unpredictable she was. He then left the bar. However, when he noticed Torguson's car in the parking lot, he decided to drive his car around to the rear of the bar to see if Torguson was there. After parking and getting out of his car, he saw a woman that might have been Vidrio (although he was not sure) sitting on the steps. When the woman saw him, she stood up and went into the bar. Jackson went and looked inside through the back door of the bar, and entered the bar when he heard Torguson call his name. Torguson asked if he and Vidrio were "all right" and Jackson responded that they were. Torguson told him Vidrio was in the bathroom, and Jackson responded that he had better leave. Because Jackson was now remembering how unpredictable Vidrio could be, alternating between being happy, paranoid, and angry, he decided he did not want a confrontation.

Jackson testified that as he was walking towards the back door to leave the bar, he saw Vidrio exit the bathroom. Vidrio was looking at him and walking quickly towards him. When she was about three or four feet from him, he saw that she was holding a knife in her right hand. She was not pointing the knife at him, but was holding it in front of her with the blade open. Feeling threatened, Jackson grabbed her right arm and pushed her about five or six feet. As he was doing this, he was also pulling out his gun

for self-defense. Vidrio now had her side towards him and she was still holding the knife in her hand. As soon as he pulled out the gun, Vidrio stated, "He's got a gun."

According to Jackson, Grimaldi grabbed the gun but Jackson quickly pulled the gun away and regained control of it. Because Grimaldi had grabbed the gun, Jackson now felt threatened by both Vidrio and others in the bar. Jackson aimed the gun towards Vidrio and pulled the trigger. In the instant when he pulled the trigger, Vidrio turned so her back was now facing him.

Psychiatrist Richard Rappaport called by the defense explained the "flight or fight" response that arises when people perceive something threatening to them. When this response is triggered, the brain reacts spontaneously without judgment or decision and critical thinking is eliminated. Dr. Rappaport opined that the flight or fight response would be triggered when a person perceives a threat from another person approaching with a knife in his or her hand.

Jury Verdict and Sentence

Jackson was charged with premeditated attempted murder and assault with a semi-automatic firearm, with enhancements for personal use of a firearm and personal infliction of great bodily injury involving domestic violence. The information also alleged enhancements for a prison prior conviction, two serious felony prior convictions, and two strike prior convictions.

In closing arguments to the jury, defense counsel argued that Jackson should be acquitted of premeditated attempted murder and assault with a firearm based on reasonable self-defense in response to Vidrio's display of the knife. Alternatively,

defense counsel argued against the premeditated attempted murder charge, citing the expert testimony concerning the flight or fight response and urging the jury to find Jackson was acting out of irrational fear when he shot Vidrio even though her back was then turned to him. The jury was instructed on the lesser offense of attempted voluntary manslaughter based on unreasonable self-defense, and (relevant to attempted second degree murder) instructed to decide the issue of premeditation if it found the defendant guilty of attempted murder.

The jury rejected Jackson's self-defense theory and found him guilty of premeditated attempted murder and assault with a semiautomatic firearm, with true findings on the firearm use and great bodily injury enhancements. The enhancements based on his prior convictions were found true, and he was sentenced to 67 years to life plus a 10-year determinate term.

DISCUSSION

Prior to trial, Jackson moved to admit impeachment evidence concerning Vidrio's methamphetamine use and alleged prior fraudulent misconduct. Jackson asserts the court abused its discretion and denied him a fair trial by denying his requests to admit this evidence.

I. Exclusion of Evidence of Victim's Methamphetamine Use

A. Background

Defense counsel's request to admit evidence of Vidrio's methamphetamine use was initially based on a notation in the medical report prepared by Dr. Yang referring to "meth[amphetamine] abuse" by the victim. Defense counsel told the court that he wanted

to ask Vidrio if she had used methamphetamine on the night of the shooting. The court responded that the notation in the medical report was sufficient to permit defense counsel to question Vidrio about methamphetamine use within 24 hours of the shooting because this could affect her ability to recall or perceive the incident, but the defense could not question her about past drug use. However, the court ruled that if Vidrio denied methamphetamine use within 24 hours of the shooting *and* there was evidence that she was a methamphetamine addict, the defense could seek to impeach her testimony on this point based on the notation in the medical report. The court stated that prior to Dr. Yang's testimony, defense counsel should obtain more information from him to determine if there were indications that she was a methamphetamine addict.

During cross-examination at trial, Vidrio denied that she had used methamphetamine on the day or night of the shooting. Thereafter, during a discussion outside the presence of the jury, the parties informed the court that Dr. Yang had stated the methamphetamine abuse notation in the medical report had been derived from a urine drug screen performed on Vidrio that tested positive for methamphetamine. However, there was no measurement of the amount of methamphetamine, and Dr. Yang had no information about when or how much of the drug was used. Defense counsel requested that he nevertheless be permitted to raise the issue of the positive test result with Dr. Yang and, based on the positive test result, impeach Vidrio's testimony that she had not used methamphetamine the day or evening of the shooting. The prosecutor objected, asserting there was no evidence Vidrio used the drug the day of the incident and the positive drug screen could have been from drug use one or two days before the incident.

The court concluded the positive drug test should be excluded under Evidence Code section 352 because the evidence had little or no relevance without information concerning the amount of the drug that was used, when it was used, and what effect it would have. The court stated that any small relevance was outweighed by the potential for prejudice and undue time consumption.

B. *Analysis*

Jackson asserts that the positive urine test was sufficient to support an inference that Vidrio was under the influence at the time of the shooting, and accordingly he should have been permitted to cross-examine her further about her methamphetamine use (i.e., asking when she last used) and he should have been permitted to present and confront her with the positive urine test evidence. He contends the methamphetamine use evidence was relevant to show that she did not accurately perceive or recall what occurred so as to provide support for his version of the incident; it was also relevant to impeach her credibility by showing that she was untruthful on the stand; and the court should not have excluded the evidence under Evidence Code section 352.

A defendant's constitutional right to a fair trial includes the right to present all relevant evidence that is of significant value to the defense case. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) Relevant evidence means evidence, including evidence relevant to credibility, that has any tendency to prove or disprove any disputed material fact. (*People v. Boyette* (2002) 29 Cal.4th 381, 428.) Even weak evidence is relevant if it tends to prove an issue before the jury; the weight of such evidence is for the jury to determine. (*People v. Freeman* (1994) 8 Cal.4th 450, 491; *People v. Slocum* (1975) 52

Cal.App.3d 867, 891.) A trial court's discretionary power to exclude evidence under Evidence Code section 352 for undue prejudice, confusion, or time consumption "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense." (*People v. Cunningham, supra*, 25 Cal.4th at pp. 998-999.) The trial court has broad discretion to decide these evidentiary issues, and we review the court's rulings for abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

As recognized by the trial court, evidence of the victim's methamphetamine use at or near the time of the shooting was relevant to the issue of the victim's ability to perceive and recall what occurred. Jackson disputed Vidrio's claim that the knife was not visible, claiming instead that Vidrio had the knife out and that he shot her out of a reasonable or unreasonable fear for his life, thus supporting verdicts of acquittal, attempted voluntary manslaughter, or attempted second degree murder rather than premeditated attempted first degree murder. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) Because refutation of Vidrio's version of the incident was a crucial component of Jackson's theory of defense, evidence that her perceptions and recall could have been impaired by methamphetamine use had significant relevance to the defense case. Further, once Vidrio testified she had not used methamphetamine on the day or evening of the incident, evidence showing she was untruthful about her recent drug use could support an inference that she was also untruthful about not displaying the knife. Thus, this was not a case where drug use

evidence was proffered solely to make "'the victim of a crime look bad.'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.)

During the initial discussions concerning the methamphetamine use issue, the trial court indicated that defense counsel could cross-examine Vidrio based on the "methamphetamine abuse" notation in the medical report if there was evidence she was addicted to methamphetamine. When the issue was again discussed, no such addiction evidence was proffered.¹ Arguably, once the positive drug screen test was identified as the source of the methamphetamine abuse notation, the trial court should have permitted cross-examination of Vidrio based on the positive test result. (See *People v. Wright* (1985) 39 Cal.3d 576, 583-584 [court should have admitted evidence of victim's positive drug test to support self-defense theory and to impeach claim of no recent drug use].) The positive test result at the hospital after the shooting created at least a reasonable possibility that Vidrio was using methamphetamine at or near the time of the incident. Although there was no available information concerning the amount or time of usage, defense counsel may have been able to elicit this information by confronting Vidrio with the test result on cross-examination. We note that it is not clear from the record whether defense counsel was asking to recall Vidrio and question her (as opposed to Dr. Yang) about the positive test result, and we are not certain the trial court would have precluded this cross-examination of Vidrio had it been clearly requested.

¹ Later, during Jackson's testimony, Jackson suggested Vidrio was an addict, stating that her use of "crystal meth" was the cause of the problems in their relationship, and referring to Shooters as being "[Vidrio's] bar" and a "tweaker bar" frequented by methamphetamine users.

In any event, assuming *arguendo* there was error in the trial court's exclusionary ruling, it was harmless under any standard of review. (*People v. Boyette, supra*, 29 Cal.4th at pp. 428 [harmless beyond a reasonable doubt standard applies if exclusionary ruling completely prevents defense; reasonable probability of different outcome standard applies if ruling merely precluded some evidence concerning defense].) Complete self-defense supporting an acquittal arises if the defendant has an actual and reasonable belief in the existence of imminent peril, and imperfect self-defense supporting manslaughter (or attempted manslaughter) arises if the defendant subjectively believes there is imminent peril but the belief is objectively unreasonable. (*People v. Humphrey, supra*, 13 Cal.4th at p. 1082; *People v. Crandell* (1988) 46 Cal.3d 833, 873-874, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) For both reasonable and unreasonable self-defense, the defendant must have an actual belief in imminent peril (*In re Christian S.* (1974) 7 Cal.4th 768, 783), and the self-defense must cease once the defendant knows the perceived danger is over (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 202; *People v. Crandell, supra*, 46 Cal.3d at p. 873).

Here, even if the jury was presented with the methamphetamine use evidence and used it to credit Jackson's claim that Vidrio had the knife out in a manner that appeared threatening to him, the record creates a compelling inference that Jackson did not actually believe he was in imminent danger and that he knew any perceived peril was over when he shot Vidrio. Vidrio testified that as soon as she saw the gun, she turned to leave, and Jackson then shot her in the back. Three eyewitnesses (as well as the medical evidence) corroborated that Vidrio's back was turned towards Jackson when he shot the gun. None

of the witnesses, including Jackson himself, described any acts by Vidrio that suggested she was in a position to immediately stab Jackson when he shot her. Jackson testified that he saw the knife when Vidrio was about three to four feet from him; he then grabbed her and pushed her about five to six feet away; and her side was turned towards him when he shot her. Even under Jackson's version of the events, the facts that Vidrio had her side turned towards him and that she was five to six feet away from him, strongly support that Jackson knew she was not close enough to stab him and that she was retreating and was no longer threatening him with the knife. Once Jackson knew the perceived danger was over, he could no longer support a claim of reasonable or unreasonable self-defense.

Jackson's claim that he also felt threatened because Grimaldi tried to grab the gun from him does not provide convincing support for his claim of reasonable or unreasonable self-defense. Once Jackson regained control of the gun, Grimaldi had nothing with which to attack Jackson, which undermines a claim that Jackson actually perceived he was in imminent danger from Grimaldi. Given the strength of the evidence showing the victim's retreat and lack of imminent danger, there is no reasonable possibility that the jury would have credited Jackson's theories of reasonable or unreasonable self-defense even if it had heard the methamphetamine evidence and based thereon believed the victim had displayed the knife in a manner that Jackson perceived as threatening.

There is also no reasonable possibility that the evidence concerning the victim's methamphetamine use might have caused the jury to reject a premeditation finding.

Again, assuming that the excluded evidence might have strengthened the defense theory that the victim displayed the knife, the record nevertheless contains strong evidence that the shooting was premeditated rather than a mere response to the knife display. Jackson testified that he retrieved a gun and went to the bar with the intention of telling Vidrio to leave him alone. The fact that he brought a gun to the bar and planned to confront the victim, as well as the evidence showing his history of assaulting and threatening to kill her, created a compelling inference of premeditation. We are satisfied beyond a reasonable doubt that even if the jury had heard the methamphetamine evidence and concluded Vidrio had displayed the knife, this would not have convinced the jury to reject the evidence showing premeditated attempted murder.

To support his claim of prejudice, Jackson notes that the jury asked for a read-back of the victim's and the defendant's testimony and that the jury deliberated over the course of three days. He asserts that this reflects a jury assessment that this was a close case. We will not speculate as to the reasons for the read-back requests and the length of the deliberations. The record shows that there was highly convincing evidence that the shooting was premeditated attempted murder. Under these circumstances, the court's exclusion of the methamphetamine evidence did not affect the verdict.

II. Exclusion of Evidence Concerning Victim's Alleged Prior Fraudulent Misconduct

In addition to the methamphetamine use evidence, prior to trial the defense moved to admit impeachment evidence concerning the victim's alleged prior fraudulent misconduct. The misconduct evidence arose from a complaint filed by the district attorney in August 2006 alleging that Vidrio had fraudulently written and cashed checks

using her ex-husband's (Marc Vidrio's) checks. The complaint was dismissed (apparently when Vidrio was in the hospital after being shot by Jackson). According to the prosecutor, the case was dismissed because Marc's daughters contradicted the information provided by Marc. According to defense counsel, Marc told a defense investigator that he did not understand why the charges were dismissed because there was a strong case against his ex-wife.

The trial court ruled to exclude the evidence under Evidence Code section 352, reasoning that the misconduct did not involve violence, the charges had been dismissed, and it was not appropriate to delve into the "bucket of worms" regarding whether there was a basis for the charges. The court emphasized, however, that the defense could call Marc as a witness to give his opinion about Vidrio's character for truthfulness, but he could not refer to the specific conduct concerning the check fraud allegations. Jackson asserts the trial court abused its discretion and violated his constitutional right to a fair trial by depriving him of the opportunity to impeach Vidrio with the fraud allegations.

Evidence of a witness's criminal conduct involving moral turpitude is generally admissible to attack credibility, subject to the trial court's discretion under Evidence Code section 352 to exclude the evidence if it is unduly prejudicial, confusing or time consuming. (*People v. Harris, supra*, 37 Cal.4th at p. 337; *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292, 295-296.) Exclusion of evidence under Evidence Code section 352 does not contravene a defendant's constitutional rights unless the defendant can show that the excluded evidence would have produced a significantly different impression of the witness's credibility. (*People v. Brown* (2003) 31 Cal.4th 518, 545-546.)

When deciding whether to admit misconduct evidence to impeach a witness, the trial court must make a preliminary fact determination that there is sufficient evidence to sustain a finding the misconduct occurred. (See *People v. Wheeler*, *supra*, 4 Cal.4th at pp. 296-297 & fn. 7 [when exercising discretion under Evidence Code section 352, court may consider problems of proof when deciding whether to admit misconduct evidence other than felony convictions for impeachment]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 361-362 [proponent of evidence has burden to show preliminary fact that misconduct occurred].) Here, the evidence was in dispute as to whether the misconduct occurred. The fraud charges against Vidrio had been dismissed, and the district attorney's office maintained that the evidence was not sufficient to pursue the charges. Thus, the trial court reasonably concluded that Jackson had not shown the misconduct had occurred, and a lengthy hearing involving Vidrio, her daughters, and her ex-husband would be required to assess whether there was sufficient evidence that it had occurred. Further, unlike the methamphetamine use evidence, the fraud evidence did not concern the circumstances surrounding the offense, but was merely general impeachment evidence. Under these circumstances, the trial court did not abuse its discretion by excluding the evidence on the basis that that the potential for undue time consumption outweighed probative value. Given the uncertainty as to whether the fraudulent conduct occurred, Jackson has also not shown the excluded evidence would have produced a significantly different impression of Vidrio's credibility to support a constitutional violation.

We also reject Jackson's contention that the record shows the trial court's evidentiary rulings were motivated by a concern not to prolong the trial due to the court's scheduled vacation. The record reflects the trial court carefully evaluated the evidentiary issues, and we will not assume an improper motive merely because at the commencement of trial the court mentioned its scheduled vacation.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.